

HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUNTERS CAPITAL, LLC et al,

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant.

Case No. 20-cv-00983 TSZ

CITY OF SEATTLE'S OPPOSITION TO
MOTION FOR CLASS CERTIFICATION

**NOTED ON MOTION CALENDAR:
February 18, 2022**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs’ Motion for Class Certification (Dkt. 65), which seeks to create 30 issues classes and three subclasses regarding the CHAZ/CHOP, fails for at least six reasons. First, Plaintiffs fail to meet Rule 23(a)(2)’s commonality requirement. Second, the claims of Plaintiffs’ class representatives are not “typical” of those in the proposed class as required by Rule 23(a)(3). Third, because the claims of the proposed representatives are not typical of claims of the alleged class, Plaintiffs cannot show that the proposed representatives “will fairly and adequately protect the interests of the class” as required by Rule 23(a)(4). Fourth, Plaintiffs cannot satisfy Rule 23(b)(3), because common questions of law or fact (if any) do not “predominate over any questions affecting only individual members,” nor is “a class action . . . superior to other available methods for fairly and effectively adjudicating the controversy.” Fifth, Plaintiffs cannot show that their resort to Rule 23(c)(4) and (5) is “appropriate”; it is advanced on behalf of many who have no underlying claim. Lastly, Plaintiffs’ proposed subclasses include many individuals and entities with no viable claims—i.e., they lack standing.

Use of Rule 23 is reserved for matters where numerous parties have experienced the same or similar impact from the same action, making class treatment comparatively more efficient than multiple individual actions. It is not a device to allow a few plaintiffs to testify about their unique experiences and impacts to establish a defendant’s liability to a host of parties who either could not establish liability on their own or had no loss. Plaintiffs’ proposed classes are entirely different from the class certified by this Court in *Hickey v. City of Seattle*, 236 F.R.D 659 (W.D. Wash. 2006), where every class member did exactly the same thing (protested in a designated no protest zone) and was subjected to exactly the same action with the same impact (arrest at the same time). The Supreme Court’s directive could not be clearer:

What matters to class certification . . . is not the raising of common ‘questions’—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

1 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted).

2 The City has uncovered no case where Rule 23 was used to certify a class with interests
3 and impacts as diverse (or non-existent) as those here. Plaintiffs' motion should be denied.

4 II. FACTS

5 A. Many of the Economic Harms Plaintiffs and the Putative Class and Subclasses 6 Members Claim to Have Suffered Were Caused by Covid-19; Not CHOP.

7 On March 23, 2020, Governor Inslee issued Washington's "Stay Home, Stay Healthy"
8 order which required all non-essential businesses to close "no later than midnight on March 25,
9 2020" due to the Covid-19 pandemic. Farmer Decl., Ex. 1 at ¶ 3(a);¹ Ex. 2 (Kilburn Dep. 43:22-
10 24). On May 4, 2020, Governor Inslee announced Washington's "phased-in approach to re-
11 opening." Farmer Decl., Ex. 3; *see also* Ex. 4. Because of infection rates, King County remained
12 in Phase 1 (all non-essential businesses closed) until June 4, 2020. At that point, the County
13 moved to a modified Phase 1: restaurants could resume outdoor dining at 50 percent of capacity
14 and indoor dining at 25 percent (provided seating was more than 6 feet apart); non-essential retail
15 activities could resume at 15 percent capacity; and personal services (hairstylists, tattoo artists,
16 etc.) and professional services (accountants, engineers, etc.) could resume at 25 percent capacity.
17 Farmer Decl., Ex. 5. King County could not enter Phase 2 of reopening until June 19, 2020,
18 (Farmer Decl., Ex. 6), approximately a week and a half after the formation of the CHAZ/CHOP.
19 Phase 3, which did not occur until March 22, 2021, permitted, among other activities, indoor gyms
20 to resume operation at less than 50 percent capacity and bars at less than 25 percent capacity.
21 Farmer Decl., Ex. 4; Ex. 7. Night clubs could not open until Phase 4. Farmer Decl., Ex. 4.

22 Because of these Covid-19 restrictions and/or the threat of contracting or spreading Covid-
23 19, some members of the alleged class were either required to, or decided to, keep their businesses
24 closed or operating at limited capacity through some or all of June and July 2020. 8 oz. Burger &
25 Co., for example, located just outside the Class Area, decided on June 16, 2020 "to stay in the 'to-
26

¹ Exhibits referenced herein are attached to the Declaration of Tyler L. Farmer (hereinafter "Farmer Decl."), filed February 7, 2022 in support of the City of Seattle's Opposition to Motion for Class Certification.

1 go/delivery’ model for the foreseeable future” “even though [it was] allowed to have customers
 2 physically back in [the] restaurant,” citing the “health and well-being of our staff, community, and
 3 our small business” given the “many unknowns about this virus.” Farmer Decl., Ex. 8.² Unicorn
 4 Bar, located within Plaintiffs’ Class Area at 1118 Pike Street, but beyond any barrier locations,
 5 was unable to open under the applicable Covid-19 rules until mid-August 2020, when it was able
 6 “to change [its] licensing over from a Nightclub License to a regular Bar/Restaurant License” and
 7 thus could “reopen before Phase 4.”³ Nevertheless, Unicorn Bar’s landlord, Plaintiff Madrona, is
 8 seeking damages in this case for [REDACTED] in lost rent from the Unicorn Bar, claiming CHOP (and
 9 not Covid-19) led to Unicorn Bar’s inability to pay rent starting when it was still closed in June
 10 and for roughly six months thereafter. Farmer Decl., Ex. 11 (Augustine Dep. at 54:10-55:25); Ex.
 11 12. Rock Box, too, stayed closed until October/November 2020 for pandemic-related reasons.
 12 Farmer Decl., Ex. 13. Yet Plaintiff Hunters Capital is seeking more than \$3.7 million in damages
 13 in this class action, largely based on claimed lost rent from tenants like Rock Box. *See* Farmer
 14 Decl., Ex. 14 (Cronauer Dep. at 101:2-20); Ex. 88.

15 Solely because of Covid-19, some individuals and business owners in the proposed Class
 16 Area either broke or decided not to renew their leases, or simply stopped paying their rent. In
 17 some cases, this occurred before June 9, 2020, Plaintiffs’ “Class Date.” *See* Dkt. 65 at p. 20. For
 18 example, The Riveter, a member of Plaintiffs’ proposed Business Owners Subclass, gave Plaintiff
 19 Hunter Capital notice it likely would need to terminate its lease prior to June 9, 2020. Farmer
 20 Decl., Ex. 14 (Cronauer Dep. at 101:2-20, 178:13-178:13-22); Ex. 15.⁴ In 2020, more than \$37
 21 million in relief money was granted to King County residents under the Eviction Prevention and
 22

23 ² *See also* Farmer Decl., Ex. 9, (Capitol Cider’s June 23, 2020 Facebook post: “...we’re opening our doors tomorrow
 WEDNESDAY, JUNE 24th” after shuttering because of Covid-19) (emphasis in original).

24 ³ Farmer Decl., Ex. 10, (Unicorn Bar’s August 14, 2020 Facebook post: “We have reached the end of week 21 of
 25 quarantine and have some exciting news on the horizon! We have been given the opportunity to change our licensing
 over from a Nightclub License to a regular Bar/Restaurant License, so we can reopen before Phase 4!!!”).

26 ⁴ *See also* Farmer Decl., Ex. 91 (April 13, 2020 letter to Hunters Capital from member of Business Owner Subclass
 requesting rent deferral relief because of Covid-19); Ex. 92 (March 11, 2020 email from Ethan Stowell Restaurants
 informing Hunters Capital that it will “be suspending all . . . rent payments” effective April 1, citing a “precipitous
 drop in business” due to Covid-19).

1 Rent Assistance Program (EPRAP) established to help area tenants having difficulty paying rent
 2 due to the Covid-19 pandemic. The Class Area was not different from other surrounding areas:
 3 paying rent was an issue for many because of “unemployment, lost wages, or health crises as a
 4 result of Covid-19.” Farmer Decl., Ex. 16. Separately, other businesses in the Class Area
 5 requested rent abatement not because of Covid-19- or CHOP-related impacts, but because they
 6 were failing or poorly managed businesses. *See* Farmer Decl., Ex. 84 (Oaksmith Dep. at 151:4-
 7 153:5, 154:9-20).

8 Named Plaintiff Richmark Label’s designated 30(b)(6) witness testified that only two of
 9 Richmark Label’s more than 30 commercial tenants sought rent concessions related to CHOP: a
 10 commercial travel agent tenant and Northwest Liquor, a former named Plaintiff in this suit. *See*
 11 Farmer Decl., Ex. 18; Ex. 19 (Donner Dep. at 167:2-14; 176:12-17); Ex. 20. Although the
 12 commercial travel agent tenant requested rent relief due in part to “the pandemic,” Richmark Label
 13 now claims that the refund was fully attributable to the CHOP. *See* Farmer Decl., Ex. 17; Ex.
 14 89. In other words, at most, only two of Richmark Label’s commercial tenants align with the
 15 “class” claims.

16 **B. Individual Issues Defeat Plaintiffs’ Proposed Subclasses.**

17 The situations, attitudes, and experiences of members within the three subclasses Plaintiffs
 18 ask this Court to certify differed widely during the CHOP period. Some members of the Resident
 19 Subclass, including subclass representative Matthew Ploszaj, publicly spoke out against CHOP.
 20 Farmer Decl., Ex. 21 (Ploszaj Dep. at 154:9-11). But other putative class members, like the
 21 residents of 12th Ave Arts, a Community Roots Housing program, supported the protests and
 22 CHOP. Farmer Decl., Ex. 22 (“Since the police left, things have been peaceful. We can only
 23 conclude that the police were the problem.”).⁵ Some Resident Subclass members joined in the
 24

25 ⁵ *See also* Farmer Decl., Ex. 23 (Antolin & Tarbet: “remov[al]” of SPD “from the East Precinct” caused them to feel
 26 “safest in this neighborhood”); Ex. 24; Ex. 22 (Packard building residents, located across the street from the East
 Precinct: “We felt a strong sense of increased safety as the police forces abandoned the East Precinct and our streets.
 Since then, the well-intentioned creation CHOP has provoked inspiring community conversations, innovative protest

1 protests and CHOP. *Id.* (“We look forward to working with [the organizers and demonstrators
 2 working to end systemic racism and militarized policing] as the demonstrations continue to
 3 unfold.”). It also is a near certainty that members of the Resident Subclass left their homes and
 4 were absent for June and July 2020 (or longer) because of the Covid-19 pandemic and resulting
 5 remote work options. Farmer Decl., Exs. 25-27. As named plaintiff Wade Biller, a member of the
 6 putative Resident Subclass, testified when asked how putative class members might have been
 7 affected differently by CHOP:

8 A. I would have to agree. I would use myself as an example on both sides of
 9 that consideration because I don’t – I know that I have gone through a lot of
 10 mental and emotional trauma, but it’s – it’s kind of a badge of honor, it’s kind of
 11 unfortunate.^[6] *And also I know that there are other folks that maybe didn’t have*
 12 *the same experience that may have felt more traumatized or had other*
 13 *experiences where they didn’t perceive harm at all or didn’t have any trauma or*
 14 *circumstances that they didn’t see as negative, depending on when they went to*
 15 *CHOP, in CHOP, or whether they could leave the area.*

13 Q. It’s kind of – it depends on the individual. Is that—

14 A. Exactly, right.

15 Farmer Decl., Ex. 28 (Biller Dep. at 208:6-19) (emphasis added).

16 The same applies to the Business Owners and Property Owners Subclass members. Some
 17 spoke out against protest activity near Cal Anderson Park and the CHOP.⁷ Others publicly
 18 supported demonstrations and CHOP,⁸ including Vermillion by offering “a relief, aid, and
 19

20 strategies and a thorough list of organized demands focused on community-based ideals that support healthy, equitable
 communities.”).

21 ⁶ Mr. Biller was slashed in the arm by a woman carrying a machete in September 2020, more than two months after the
 22 CHOP was cleared. Farmer Decl., Ex. 28 (Biller Dep. at 188:3-7).

23 ⁷ Business Owners: Farmer Decl., Ex. 29 (Sheffer Dep. at 162:9-19) (conceding “people were quite upset with the
 public stance made [toward CHOP] through Cure”). Property Owners: Farmer Decl., Ex. 21 (Ploszaj Dep. at 69:18-
 20) (testifying his landlord was, at best, “neutral” toward CHOP).

24 ⁸ Business Owners: Farmer Decl., Ex. 30 (35th North Skate Shop June 7, 2020 Instagram post: “we will be opening up
 25 sometime soon but for now we are just feeling so fortunate to be on this block, in this city. For the last 9 days we have
 26 been surrounded by voices of inspiration, education, passion . . . #blacklivesmatter”); Ex. 31 (35th North Skate Shop
 June 19, 2020 Instagram post: “Curbside pick up not available today. Lots of stuff going on today, get out and
 support!”); Ex. 32 (Capitol Cider June 21, 2020 Facebook post: “Capitol Cider stands firmly as an ally with the black
 community to end violence against black lives, to demand and work to create a just society, and to call for reparations
 in recognition of our country’s history of injustice against black people.”); Ex. 33 (Rock Box June 16, 2020 Facebook

1 donation station for the duration of the protest occurring on Capitol Hill” (Farmer Decl., Ex. 37)
 2 and Sunset Electric Apartments, located next door to the East Precinct, which opened its doors to
 3 protest leadership and prominent activists (Farmer Decl., Ex. 38). Some, including Rancho Bravo
 4 (until February 7, 2022, a named Plaintiff)⁹ and class representative Richmark Label (both of
 5 which are located close to Cal Anderson Park and the East Precinct), reported an increase in
 6 revenue in June 2020. In fact, Rancho Bravo had more revenue in June 2020 than it did for any
 7 other month from the start of the pandemic through the end of 2020. Farmer Decl., Ex. 39. And
 8 Richmark Label was internally celebrating June as an incredibly successful month, while now
 9 seeking more than \$100,000 in business damages for June 2020, allegedly caused by the CHOP:

10 [C]ongratulations on making it through June 2020! What a month. There’s not a
 11 lot of people who can say they’ve been through what we just went through and
 12 not only did you make it through, but we closed 40 new accounts and we were up
 over 10% for the month compared to last June!

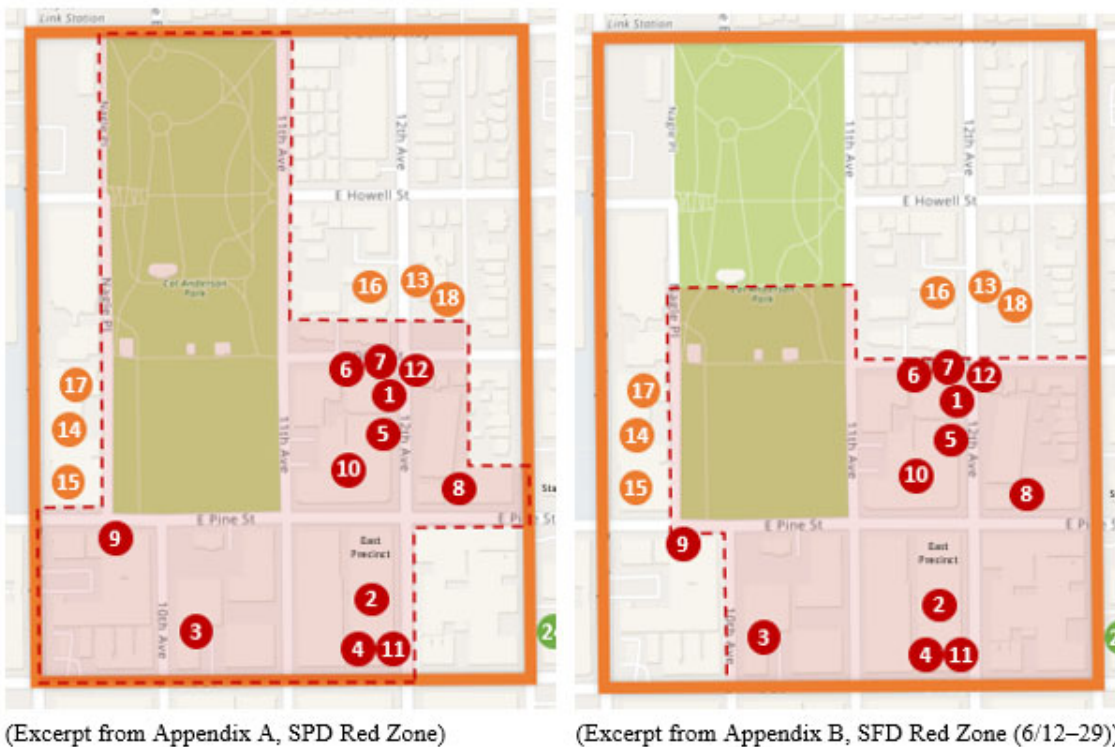
13 Farmer Decl., Ex. 40. Some businesses declined to join this lawsuit, independently pursuing
 14 claims against the City. Farmer Decl., Exs. 41-42. Others, like Unicorn Bar, were closed by
 15 Covid-19 Stay Safe orders, or elected not to be open because of Covid-19, for all of June/July
 16 2020. *See supra* n.3; *see also* Farmer Decl., Ex. 46 (Hara Dep. at 104:24-107:11) (describing
 17 “heterogeneity” of comments from businesses, from those who were “closed the whole time” to
 18 those who “had no issues whatsoever and felt like it was safer than it used to be”).

19 The putative class members’ experiences in June 2020 also differed materially based on
 20 location. Plaintiffs’ Class Area runs from Broadway to 13th Avenue, and Denny to Pike Street.

21
 22
 23 post: “There is much more we can and MUST do to support the black community”); Ex. 34 (Unicorn Bar June 1,
 24 2020 Facebook post: “We see you. We hear you. We stand with you. #blacklivesmatter”). Property Owners: Farmer
 25 Decl., Ex. 35 (Central Lutheran Church June 7, 2020 Facebook post: “We stand with [the protestors] and firmly
 believe Black Lives Matter!”); Ex. 36 (Hunters Capital June 19, 2020 Facebook post: “Let’s continue to put in the
 work and uplift black voices, everywhere, across all industries, but especially on Juneteenth.”).

26 ⁹ To date, six named Plaintiffs, including most recently Rancho Bravo, have voluntarily dismissed (some with
 prejudice) their claims against the City, further demonstrating that alleged harms suffered by members of the putative
 class are not at all common to every member of the class. *See* Dkts. 26 (Sage Physical Therapy PLLC, Kathleen
 Caples), 42 (Magdalena Sky), 59 (Argento LLC), 71 (Northwest Liquor and Wine LLC), and 72 (Rancho Bravo, Inc.).

See Appendix A.¹⁰ Many of Plaintiffs' complaints revolve around the supposed "abandonment" of this area by Seattle Police and Fire Departments. But, in fact, the Police "Red Zone" where Plaintiffs' claim SPD would not respond covers only a slice of Plaintiffs' Class Area. Entire blocks in which many Plaintiffs and putative class members lived and worked were outside the Red Zone, and thus unaffected by the claimed Red Zone limitations during June 2020. Appendix A; Farmer Decl., Ex. 43 (Mahaffey Dep. at 36:22-38:23); Ex. 93.



The same is true of SFD. To protect its firefighters from potential harm, SFD implemented its standard "Scene of Violence" protocols, identifying a small area around Cal Anderson Park and the East Precinct as a "Red Zone," where, to avoid undue risk to its personnel, SFD instructed its firefighters to wait for law enforcement before entering. Farmer Decl., Ex. 44 (Scoggins Dep. at 77:7-22, 76:19-23 ("geographic boundaries" of Red Zone "change[d]" over time depending on SFD's assessment of conditions)). Fire Chief Scoggins testified that service outside the "Red Zone" (i.e., the "Yellow Zone") was not affected, remaining as it was before June 2020. Appendix

¹⁰ For the Court's convenience, the City has attached four appendices to this brief as Appendices A-D. Paragraphs 96-99 of the Farmer Declaration describe the appendices and identify the documents used to create each.

1 B; Farmer Decl., Ex. 44 (Scoggins Dep. at 37:5-13); Ex. 45.

2 Plaintiffs also claim that the City “significantly cut back on regular services such as
3 garbage and electric services.” Dkt. 65 at p. 14. But this is simply false. As SPU Director Mami
4 Hara confirmed, garbage was picked up regularly throughout the period; any service interruptions
5 were minimal. Farmer Decl., Ex. 46 (Hara Dep. at 27:23-30:12); *see also* Ex. 47 (McDermott
6 Dep. at 221:15-17); Ex. 28 (Biller Dep. at 56:14-18). Evidence that anyone within the Class Area
7 experienced utility service disruptions in June and July 2020 is absent. *See, e.g.*, Farmer Decl., Ex.
8 47 (McDermott Dep. at 222:5-9). And any light and noise pollution from Cal Anderson Park (*see*
9 Dkt. 47 at ¶ 220), would have affected putative class members differently, or perhaps not at all,
10 based on their distance from the park. Those nearly two and a half blocks from the park near 13th
11 and Pike or Denny had vastly different experiences from those near the park.

12 The protestors’ placement and movement of barriers had a widely varying, or often no,
13 impact on putative class members. Some businesses and residences, like Bergman’s Lock and
14 Key, Car Tender, and Onyx Homeowners Association, were outside the barriered area during the
15 entire CHOP. Farmer Decl., Ex. 48 (Thompson Dep. 76:2-11, 77:4-14); Appendix C. Other
16 businesses or residences might have been within the barriers one day, and outside them the next.
17 Farmer Decl., Ex. 49 (Zimbabwe Dep. at 118:18-21) (testifying protestors moved barriers
18 “periodically”). Even individuals who were sometimes inside the barriers were not affected
19 uniformly, or at all. Bill Donner, owner of Richmark Label, testified that individuals at the barriers
20 were generally “very polite,” and always let people pass. Farmer Decl., Ex. 19 (Donner Dep. at
21 49:17-50:14, 53:13-54:17, 137:4-17); Ex. 50 (“[t]he protestors let everyone past their barricades”;
22 “[t]hey let everyone pass and trucks for deliveries”).

23 **C. The City Did Not Foresee CHOP, But Swiftly Moved to De-escalate Protest Activity,**
24 **Re-occupy the East Precinct, and Clear the CHOP.**

25 On May 25, 2020, George Floyd, a 46-year-old Black man, was killed in Minneapolis, after
26 a police officer knelt on Mr. Floyd’s neck for over nine minutes while Mr. Floyd was in police
custody. Farmer Decl., Exs. 51-52. Protests erupted nationwide, including in Seattle beginning

Friday, May 29. *Id.* Many of these protests, quickly turned violent, with protestors setting fire to and ultimately destroying the Minneapolis Third Police Precinct on May 28 (Farmer Decl., Exs. 53-55) and, in Seattle, committing violent acts and assaults, mainly targeting police officers and destroying property, including setting fire to citizen and police vehicles. Farmer Decl., Exs. 56-57.

By early June, the area around SPD's East Precinct and near the police line established at 11th Avenue and Pine Street had become the focal point of the Seattle protests.¹¹ The protests became more violent and confrontational in the first week of June. On Saturday, June 6, SPD "deploy[ed] pepper spray and blast balls" to control the crowd immediately outside the East Precinct. Farmer Decl., Ex. 60. Several SPD officers were injured, some seriously. *Id.*

This violence persisted into Saturday, June 7. Protestors pushed, punched, and threw projectiles like rocks, bottles, and commercial grade fireworks at SPD officers. Farmer Decl., Ex. 43 (Mahaffey Dep. at 75:6-23).¹² They breached SPD's metal fencing and encroached upon the precinct. *Id.* at 79:9-80:12. A man drove a vehicle into a group of protestors before shooting someone in the crowd. *Id.* After warning the crowd to step back from the police line outside the East Precinct, SPD deployed non-lethal crowd control tools in an effort to quell the unrest. *Id.*

When the June 7 protest wound down, the City and SPD decided that SPD's protest response should change to avoid further violent confrontations on the police line and consequent risks of injury or death, which in turn could aggravate conditions even more.

On June 8, after (1) considering options for managing the ongoing protests; (2) holding in-depth consultations involving SPD Command Staff and high level City executives; (3) being briefed by the FBI on credible external threats of arson to the East Precinct; and (4) analyzing alternate approaches to protecting the East Precinct, the surrounding buildings, SPD officers themselves, and the Capitol Hill community, the City decided to remove the barriers in front of the

¹¹ Farmer Decl., Ex. 21 (Ploszaj Dep. at 78:11-13) ("But it was a nightly occurrence around the East Precinct in addition to whatever else was occurring"); *see also* Farmer Decl., Ex. 58 ("Monitoring crowd from Downtown that has moved near the East Precinct."); *id.* ("Will continue to monitor the situation and allow demonstrators to exercise their rights."); Ex. 59.

¹² *See also* Farmer Decl., Ex 62 (email from SPD officer who was injured while protecting the East Precinct on June 7 to Assistant Chief Mahaffey stating he was "terrified" and "believe[d] the worst is yet to come").

1 East Precinct, open the street, and permit protesters to march past the East Precinct. Farmer Decl.,
 2 Ex. 44 (Scoggins Dep. at 133:2-20); Ex. 63 (Durkan Dep. 104:25-105:9); Ex. 64 (Best Dep. 62:8-
 3 10); Exs. 65-66. This decision was a judgment call made in unprecedented circumstances.

4 Mayor Durkan explained that her decision was based on the need to “reduc[e] the tension”
 5 and “de-escalat[e]” the interactions between SPD and the protestors. Farmer Decl., Ex. 67. The
 6 Mayor’s Office did not direct SPD in the operational details of managing the “open street”
 7 scenario; SPD Command Staff exercised its discretion in the specific steps of addressing this fluid
 8 situation. Farmer Decl., Ex. 43 (Mahaffey Dep. at 73:3-15, 80:18-24).

9 Later that day, after assessing the fluid situation and weighing the First Amendment
 10 interests of the protestors against the need to reduce violence and secure the precinct, police
 11 resources, and the safety of SPD officers and people in the area, SPD Command Staff decided how
 12 to proceed. It gave the order to temporarily evacuate the East Precinct and re-stage nearby. *Id.* at
 13 73:3-15.¹³ Chief Mahaffey explained the decision to temporarily leave the East Precinct:

14 A. Well, there’s a lot that went into that decision. It was not easily made. The
 15 overarching concern was, the need to de-escalate would have been going on the
 16 previous week, which was a constant focus on the precinct by the protesters, to
 the point that the precinct had become inoperable.

17 We had nearly nightly clashes with protesters involving significant amounts of --
 18 we had to use force to deal with the crowd. We had force used against us by the
 crowd.

19 We had officers injured. We had members of the protest crowd injured, and it
 20 was seemingly not going to end. So that was the overall goal, was to prevent any
 further clashes with the crowd and injuries to officers.

21 There was also concerns about the building being attacked and destroyed. We had
 22 information from the FBI. I knew that a precinct had been burned in Minneapolis,
 Minnesota, as a result of protests they had there. I had information other
 23 government buildings were being attacked.

24 So I had a great concern that based on what had been occurring the previous
 25 weeks, that the East Precinct would be another target, which, based on where it

26 ¹³ See also Farmer Decl., Ex. 68 (email from Assistant Chief Mahaffey to SPD officer: “. . . I never wanted us to give
 up one of our precincts. I, along with the other commanders assigned to the events over the past week realized we
 could not continue going toe to toe with the crowd at 11 and Pine every night. We were getting too many officers
 hurt and had no support for our tactics.”).

1 sits on the block, there's really only two ways in and out of it.

2 And overall, ... that was my greatest concern, was keeping ... people safe, and
3 not being able to keep people in there, as we were not going to be able to use the
tactics, which was using police officers directly to manage and address the crowd.

4 So that was the course of action that I felt was the best to prevent confrontation, to
5 de-escalate, prevent injury, and keep police officers and the public safe.

6 *Id.* at 73:20-75:5.

7 When SPD decided to leave the East Precinct building on June 8, its plan was to re-occupy
8 it later that night or early the next day. There is no dispute on this point. But when SPD officers
9 returned to the East Precinct at approximately 5:30 a.m. on June 9, they were met with protesters
10 who “appear[ed] to ha[ve] dug in and [we]re planning to stay for some duration.” Farmer Decl.,
11 Ex. 69. SPD officers reported that “[s]ome” of the protesters “were reasonable,” but that “others
12 were extremely confrontational,” including “[o]ne individual, in particular” who “was open-carry
13 armed with a handgun and exhibited behavior that would warrant an ERPO [Extreme Risk
14 Protection Order],” and demanded SPD “get off their sovereign land.” *Id.*

15 At that point, the officers on site made the judgment call to retreat, rather than to initiate a
16 likely violent confrontation that could have aggravated the overall situation. The goal was to avoid
17 explosive outcomes that could lead to a conflagration of violence—which occurred in other cities
18 dealing with similar conditions. *See* Farmer Decl., Ex. 63 (Durkan Dep. at 77:6-78:17).

19 On June 11, SPD made another effort to establish operations at the East Precinct, but was
20 forced to leave after individuals started fires outside the precinct later that night, making officers
21 feel endangered. Farmer Decl., Ex. 43 (Mahaffey Dep. at 97:2-98:11). That same day, this
22 District issued a temporary restraining order, limiting SPD’s ability to deal with protestors via less-
23 lethal tools. Farmer Decl., Ex. 70. To both comply with the court order and address the increasing
24 violence of some protestors, SPD devised a demonstration response protocol designed to protect
25 officers, demonstrators, and the public from injury while devising methods to de-escalate the
26

1 situation and ultimately to clear the CHOP.¹⁴ As Mayor Jenny Durkan stated:

2 [I]t's a phased approach, we knew we had to try to de-escalate and calm things
3 down. We then had to try to shrink the number of people who were there at the
4 same time that the [SPD] had to come up with a plan that they thought could
5 work, because we knew from experience, watching that when the police entered
6 that area, it could escalate things immediately because they were protests against
7 the police. . . . [R]emember, this came about because of a nightly skirmish at the
8 police line between police and protesters. And so we had to be realistic

9 Farmer Decl., Ex. 63 (Durkan Dep. at 184:24-185:10).

10 The City's approach from this point forward was to work to de-escalate the CHOP, to use
11 mechanisms to shrink the protestor population, to have several City departments ready themselves
12 to pitch in when the time came, to enhance the police capability, and to formulate a specific plan—
13 all in order to be in a position to “clear” the CHOP without a potentially disastrous, violent
14 confrontation. *Id.* at 162:13-16.

15 During this period, Mayor Durkan and other City leaders participated in daily briefings
16 aimed at achieving these goals. Farmer Decl., Ex. 63 (Durkan Dep. at 62:3-6, 162:22-25); Ex. 43
17 (Mahaffey Dep. at 94:5-11); Ex. 49 (Zimbabwe Dep. at 84:15-85:10); Ex. 94. SDOT Director Sam
18 Zimbabwe was on-site nearly daily, working to remove or shift barriers in order to shrink the
19 footprint of the CHOP Zone.¹⁵ On June 10, SDOT had removed enough barriers so that the City
20 could access and provide services to every part of the CHOP. Farmer Decl., Ex. 75; Appendix C.
21 By June 17, the City had created a regularized traffic pattern that provided public access to every
22 business and residence in the area, while continuing to provide separation between vehicles and
23 protestors in order to prevent another vehicular assault. Farmer Decl., Ex. 76; Appendix D.

24 ¹⁴ Farmer Decl., Ex. 71 (“As of now, there are too many unknown conditions that adversely impact officer safety to
25 send our officers into the blockaded area unless it is a critical life safety emergency. We had numerous incidents over
26 the past several days of calls placed that we are not able to verify that seem to be *an effort to instigate a police
response into the protest zone.*” (emphasis added)).

¹⁵ Plaintiffs likely will cite to Call Notes from June 10, 2020 at 6:00 a.m. which lists “[c]ontinuing the existing
footprint of peaceful demonstration and rights” as evidence that the City was not trying to shrink the footprint of the
CHOP Zone. Farmer Decl., Ex. 72. But the language immediately below that statement (e.g., “Pursue physical
modifications to the footprint,” “Get out non-SDOT barriers”), *id.*, and from emails sent right before and after the Call
Notes shows the City's goal was to shrink the CHOP Zone footprint, Farmer Decl., Ex. 73 (“be on site and come up
with a plan . . . for access and reopening streets”); Ex. 74 (“Pursue Physical Modifications to Barriers/Footprint”).

1 SPU Director Mami Hara was also in the CHOP almost daily from June 9 through July 1,
 2 coordinating service for the businesses, residents, protesters, and visitors in the area. She made
 3 sure that any blockages that had sprung up overnight were removed each morning, and that
 4 businesses and residences around Cal Anderson Park received regular garbage and recycling
 5 service throughout the month of June. Farmer Decl., Ex. 46 (Hara Dep. at 15:11-19); Ex. 47
 6 (McDermott Dep. 221:15-17); Ex. 28 (Biller Dep. at 56:14-18).

7 As of June 2020, Covid-19 was still a new and evolving problem. The City was concerned
 8 about the influx of large crowds into the Cal Anderson Park area. So, the City made the judgment
 9 call to provide port-a-potties and sanitation stations to the area. Other options were not available.
 10 Businesses in the area, if they were even open, were not making their bathrooms available to the
 11 public because of the pandemic. The permanent Cal Anderson bathrooms were out of service. *See*
 12 Farmer Decl., Ex. 46 (Hara Dep. at 68:20-69:19). These public health concerns also led SPU to
 13 provide dumpsters, garbage bags, and garbage service near Cal Anderson on a daily basis. *Id.* at
 14 26:10-20, 27:10-22, 32:22-33:8.

15 These efforts continued after a person was shot and killed on June 20. On Monday, June
 16 22, Mayor Durkan, Chief Best, and Black community leaders responded to the increasing violence
 17 by “urg[ing] demonstrators to leave Cal Anderson Park for their safety and the safety of those
 18 living and working nearby.” Farmer Decl., Ex. 77.

19 On June 26, Mayor Durkan met with and again urged CHOP participants to disperse. *Id.*;
 20 *see also* Farmer Decl., Ex. 78. That same day, SDOT and other City agencies, supported by SPD
 21 personnel in a subordinate role, attempted to clear the streets of the barriers near the East Precinct,
 22 but were met with a hostile crowd, which prevented SDOT from completing that work—including
 23 “people lying down in front of [the] construction equipment” needed to remove the barriers, “lying
 24 on top of barriers,” and “forming crowds around [SDOT staff] and . . . shouting down the idea that
 25 [SDOT] would be removing the barriers.” Farmer Decl., Ex. 49 (Zimbabwe Dep. at 184:20-
 26 186:10); Ex. 79.

1 By late June, the City’s evolving efforts had begun to bear fruit. The number of people in
 2 the park dropped to a level that allowed SPD and other City officials to implement the plan they
 3 had been constructing. *See* Farmer Decl., Ex. 63 (Durkan Dep. at 70:6-72:1). On June 30, Mayor
 4 Durkan issued EO 2020-08, which, among other things, ordered everyone “unlawfully occupying”
 5 the “Park area” to leave immediately and coordinated City departments’ efforts to clear the CHOP.
 6 Farmer Decl., Ex. 80. As of July 1, the areas around the East Precinct and Cal Anderson Park were
 7 cleared of all unauthorized occupants and barriers, and SDOT had begun cleaning and debris
 8 removal work. Farmer Decl., Ex. 43 (Mahaffey Dep. at 189:14-192:10); Ex. 77. SPD moved back
 9 into the East Precinct that same day, and has operated out of the precinct consistently since. *See*
 10 Farmer Decl., Ex. 81; Ex. 84 (Oaksmith Dep. at 226:23-228:2) (July 1, 2020 email from Mike
 11 Malone of named Plaintiff Hunters Capital to Chief Best: “Thank you, you’ve done a great job
 12 under the most difficult of circumstances!”).

13 **D. Plaintiffs’ Allegations Do Not Support Class Certification.**

14 According to Plaintiffs, the City’s conduct in responding to the “unique and unprecedented
 15 situation” (Farmer Decl., Ex. 64 (Best Dep. at 174:18-19)) presented by the CHOP constituted
 16 negligence and nuisance under Washington state law, and an unlawful taking and due process
 17 violation under the United States Constitution. Dkt. 47 at pp. 62-68.

18 Plaintiffs’ motion asks this Court to certify 15 issues under their substantive due process,
 19 negligence, and nuisance claims, and three subclasses (a Property Owners Subclass, a Business
 20 Owners Subclass, and a Residents Subclass) and 13 issues under their procedural due process and
 21 takings claims. Plaintiffs also (and improperly) ask this Court to certify two issues relating to a
 22 discovery dispute. Dkt. 65 at pp. 20-21; Dkt. 66-1 at pp. 2-4. None of these issues merits
 23 certifying a class, much less one including every resident, property owner, and business in the
 24 Class Area on a single day, June 9, 2020.

III. ARGUMENT

A. Plaintiffs Fail to Satisfy Rule 23's Requirements.

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’” *Wal-Mart*, 564 U.S. at 348 (citation omitted). “Class certification is proper if and only if ‘the trial court is satisfied, *after a rigorous analysis*,’ that Plaintiffs have met their burden under Rule 23.” *Southwell v. Mortg. Invs. Corp. of Ohio*, No. C13-1289 MJP, 2014 WL 3956699, at *1 (W.D. Wash. Aug. 12, 2014) (citation omitted). “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart*, 564 U.S. at 350. Instead, Plaintiffs must establish by a preponderance of the evidence that all of Rule 23’s requirements have been met. *Southwell*, 2014 WL 395669, at *1 (“While the Ninth Circuit has yet to enunciate an evidentiary benchmark . . . , this Court . . . chooses to align itself with the emerging trend in other districts toward the adoption of a preponderance of the evidence standard for facts necessary to establish the existence of a class.”).

Plaintiffs request that the Court certify its proposed class under Rule 23(c)(4) as to 30 separate “issues” and Rule 23(c)(5) as to three subclasses. Dkt. 66-1 at pp. 2-4, 8-9.¹⁶ A party seeking to use Rule 23(c)(4) or (5) first must meet all four requirements of Rule 23(a) and show that the identified issues and subclasses are maintainable under Rule 23(b)(1), (2), or (3). *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *Russell v. Educ. Comm’n for Foreign Med. Graduates*, 15 F.4th 259, 266-67 (3d Cir. 2021), *cert. pending*. Even if the requirements of Rule 23(a) and (b) are met, use of Rule 23(c) to resolve less than an entire case is “appropriate” only “if it ‘materially advances the disposition of the litigation as a whole,’” *Rahman v. Mott’s LLP*, 693 F. App’x 578, 579 (9th Cir. 2017) (citation omitted).

Plaintiffs fail to meet these requirements for at least the below six reasons.

¹⁶ Plaintiffs’ motion does not cite to Rule 23(c)(5) but should have: Plaintiffs request certification of subclasses.

B. Plaintiffs Cannot Meet their Burden Under Rule 23(a).

1. No commonality: Dissimilarities within the proposed class and subclass frustrate common answers.

Commonality requires that the “determination of [the] truth or falsity” of a “common contention . . . will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350. It is not enough that there are “common questions,” as “[a]ny competently crafted class complaint literally raises common ‘questions.’” *Id.* at 349 (citation omitted). Rather, “[w]hat matters to class certification . . . [is] the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Id.* at 350 (citation omitted) (Rule 23(a)(2) requires plaintiffs “to demonstrate that the class members ‘have suffered the same *injury*’” (citation omitted) (emphasis added)). “Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.* (citation omitted).

Here, Plaintiffs identify a host of questions they claim are common to their proposed class and subclasses. But the answers to those 30 questions are not common to the proposed class and subclasses in the way that Rule 23(a)(2) requires. That is, and as explained below, those answers will not result in the putative issues classes “prevail[ing] or fail[ing] in unison.” *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 460 (2013). Because of the many dissimilarities among class members within the same issues classes and subclasses, “the individual circumstances of particular class members [will] bear on the inquiry,” *id.*, making this case unfit for class treatment.

Takings (three subclasses): Not one of the “common issues” Plaintiffs identify with respect to their takings claim is “common.” To prove a *per se* taking, a plaintiff must establish “a physical appropriation of property.” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). Plaintiffs must also establish, *inter alia*, that the City itself effected that appropriation. *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (“[t]here clearly can be no taking when whatever acts complained of are those of private parties, not the government”); *see also Yee v. City*

1 of *Escondido, Cal.*, 503 U.S. 519, 527 (1992). The answer to Plaintiffs’ first takings issue, whether
 2 “the City’s actions constitute a *per se* taking of the rights of the members of the Subclasses” (Dkt.
 3 66-1 at p. 3), requires an individualized inquiry: whether each putative subclass member was
 4 deprived of his ability to access or use his property or of the ability to exclude others from his
 5 property because of something the City did.

6 Because of clear dissimilarities among putative class members within the same subclass,
 7 the answers to these questions will not be the same. In order to establish a “blocked access” claim,
 8 Plaintiffs must show that the City cut off ingress or egress to each class member’s property. This
 9 question is unique for each class member. So is the generalized claim that protestors physically
 10 occupied Plaintiffs’ properties via barriers or otherwise. Some putative class members never were
 11 inside any barriers; others were. *See* Appendix C. For others, any barrier effects varied by date
 12 and time. No Plaintiffs has provided any evidence that a driveway was blocked; others readily
 13 admit that they always had access. Farmer Decl., Exs. 47 (McDermott Dep. 164:5-6), 48
 14 (Thompson Dep. at 76:2-10). Not every building within the proposed Class Area was vandalized
 15 or broken into. Farmer Decl., Ex. 48 (Thompson Dep. at 111:5-15). Some class members are
 16 lessors and some are lessees, each of whose property interests are different and depend in
 17 significant part on the specific terms of their individual rental contracts. *See State v. Farmers*
 18 *Union Grain Co., Paccar Auto.*, 908 P.2d 386, 389 (Wash. Ct. App. 1996) (“It is a matter of
 19 contract; the parties are free to contract away any rights they may have under general law.”
 20 (citation omitted)). In short, the question whether any class or subclass member had its property
 21 unlawfully taken because of City action will (1) require individualized inquiry and (2) often (if not
 22 always) be answered “no.”

23 Plaintiffs’ remaining takings issues (*see* Dkt. 66-1 at p. 3) also cannot be answered with
 24 generalized proof. For example, Plaintiffs’ last takings issue (“Are members of the Subclass
 25 entitled to nominal damages?”)—like their last procedural and substantive due process issues—is
 26 simply another way of asking whether the City’s alleged actions violated the putative class and

1 subclass members' Fifth Amendment rights. While it is true that "[w]here a plaintiff proves a
 2 violation of constitutional rights, nominal damages must be awarded as a matter of law,"
 3 *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005), *amended* 2005 WL 1154321, the putative
 4 class and subclass members' "entitle[ment]" to nominal damages first requires the plaintiffs to
 5 prove that "every member of the class suffered the *same* deprivation of rights," *id.* (emphasis
 6 added). For the reasons stated above, this question can be answered only based on how specific
 7 events, unfolding in different ways over a wide area, impacted or did not impact each class
 8 member.

9 *Negligence (entire class)*: The answers to Plaintiffs' negligence claims (*see* Dkt. 66-1 at p.
 10 3) also require individual inquiry as to each purported class member. Under the public duty
 11 doctrine, "a public entity—like any other defendant—is liable for negligence only if it has a
 12 statutory or common law duty of care." *Osborn v. Mason Cnty.*, 134 P.3d 197, 202 (Wash. 2006).
 13 The legislative intent exception to that doctrine provides that a duty may exist where the
 14 government fails to comply with a statute or ordinance that mandates government action.
 15 *Washburn v. City of Fed. Way*, 310 P.3d 1275, 1287 (Wash. 2013). The exception for failure to
 16 enforce also provides that a duty may exist where, *inter alia*, legislation "create[s] a mandatory
 17 duty" that governmental agents "take specific action to correct a violation" of which they have
 18 "actual knowledge," *Fishburn v. Pierce Cnty. Planning & Land Servs. Dep't*, 250 P.3d 146, 156
 19 (Wash. Ct. App. 2011); *Ehrhart v. King Cnty.*, 460 P.3d 612, 619-20 (Wash. 2020). Plaintiffs have
 20 identified three chapters of the Seattle Municipal Code to which they claim the City failed to
 21 adhere, and over 30 state statutes and ordinances they claim the City failed to enforce during the
 22 proposed Class Period. Farmer Decl., Ex. 82.

23 But the questions whether any one of those statutes created a duty and whether the City
 24 breached any such duty are not answerable on a class-wide basis. For example, assuming RCW
 25 9A.46.020 requires law enforcement to take into custody all individuals committing harassment (it
 26 does not), a duty under the failure to enforce exception does not arise unless a plaintiff can show

that law enforcement had “actual knowledge” of the specific harassment. Thus, that SPD may have known about an instance of harassment that occurred in Cal Anderson Park to Class Member A on June 10 creates no duty enforceable in tort with respect to an incident of harassment that occurred on the corner of 13th and Denny to Class Member B on June 25 involving a different perpetrator; “actual knowledge” of the harassment to Class Member B first must be established to give rise to a duty. Likewise, Class Member C could not rely on law enforcement’s failure to intervene when Class Member A and Class Member B were harassed to prove that law enforcement did not intervene when he was harassed (i.e, to establish breach). Nor could Class Member D rely on law enforcement’s breach of a duty under RCW 9A.46.020 to establish that the City breached a duty owed to Class Member D under SMC 11.25, SMC 15.52, or any other statute or ordinance Plaintiffs identified in discovery. Each alleged instance of negligence is inherently individualized and would require the Court to analyze which of the more than 30 statutes each Plaintiff is alleging was not enforced as to that Plaintiff, and whether that statute presents an exception to the public duty doctrine.

Nuisance (entire class): Plaintiffs allege that the City’s affirmative acts or failures to act caused several different types of nuisances, including “block[ed] public rights-of-way,” “excessive noise,” “public safety hazards,” “vandalism,” and “poor health and sanitation conditions.” Dkt. 47 at ¶ 220. They also have advanced an assertion that resolution of their identified nuisance issues (i.e., whether the City’s actions “g[a]ve rise to a nuisance” and whether “any nuisance” was “reasonable in the circumstances” (Dkt. 66-1 at pp. 3-4)) “will involve evidence and law” that is “common to all [putative] Class members.” Dkt. 65 at p. 28.

This conclusory assertion is unsupported and wrong. As the Supreme Court stated in *Wal-Mart*, the mere allegation that all putative class members “have all suffered a violation of the same provision of law,” 564 U.S. at 350, is not enough to satisfy Rule 23(a)(2)’s commonality requirement:

Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single

1 company. Quite obviously, the mere claim by employees of the same company
 2 that they have suffered a Title VII injury, or even a disparate-impact Title VII
 3 injury, gives no cause to believe that all their claims can productively be litigated
 4 at once.

5 *Id.*

6 Plaintiffs have not put forward any evidence showing that all putative class members
 7 suffered the same type of nuisance (if any) during the Class Period. Nor can they. Those class
 8 members living and working near 13th and Denny (i.e., over two blocks from the park) may not,
 9 for example, have experienced the same “excessive noise” or light generated at the park as those
 10 closer, if at all. Nor would those same class members have suffered any nuisance arising from
 11 “block[ed] public rights-of-way.” Barriers were never present in that part (or many other parts) of
 12 the Class Area. Farmer Decl., Ex. 48 (Thompson Dep. at 76:2-11; 77:4-14); Appendix C. Nor is
 13 there any evidence that those outside the barriers ever experienced “public safety hazards,”
 14 “vandalism,” or “poor health and sanitation conditions.”¹⁷ Plaintiffs cannot prove their nuisance
 15 claim on a class-wide basis.

16 *Procedural due process (three subclasses):* Plaintiffs assert—without citing a single
 17 document or deposition—that resolution of their procedural due process issues (Dkt. 66-1 at p. 2)
 18 will be based on “law” and “evidence” “common to each member of each Subclass.” Dkt. 65 at p.
 19 27. This is a wholly unsupported assertion. It is insufficient as a matter of law and, as a matter of
 20 fact, incorrect.

21 As shown above, (1) the proposed Class Area includes blocks that were within and outside
 22 any barriered area, with no evidence that those putative class members outside the barriers had
 23 CHOP-related impediments accessing their buildings, businesses, or residences; (2) SPD and
 24 SFD’s response policies were dynamic throughout the Class Period and also differed between
 25 zones/areas within the Class Area¹⁸; (3) the protestors’ activities were largely isolated to areas

26 ¹⁷ Plaintiffs’ nuisance claim for “poor health and sanitation conditions” is difficult to square with their current
 argument that the City’s delivery of port-a-potties and sanitation stations to the area in order to maintain public health
 is one of the primary bases of their claims.

¹⁸ Farmer Decl., Ex. 44 (Scoggin Dep. at 37:5-13, 77:7-22); Ex. 43 (Mahaffey Dep. at 36:22-38:23).

1 immediately in or near Cal Anderson Park and the East Precinct, blocks away from parts of the
 2 Class Area; and (4) because of Covid-19 protocols and remote work opportunities, many
 3 businesses within the Class Area remained closed and some residents temporarily relocated
 4 elsewhere for the entirety of the Class Period or simply worked from home unaffected by any
 5 CHOP-related activity.

6 The fact of any deprivation, the type of deprivation, and the part the City's actions played
 7 in that deprivation (if any) cannot be established on a class- (or here, subclass-) wide basis. *See*
 8 *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

9 *Substantive due process (entire class)*: The vast differences among the putative class
 10 members and in the application of the City's alleged conduct within the Class Area also mean that
 11 Plaintiffs' five substantive due process issues cannot be resolved on a class-wide basis. As this
 12 Court set forth in its October 16, 2020 order, to succeed Plaintiffs must prove, among other things,
 13 that the City's "affirmative actions created or exposed" Plaintiffs and the putative class members
 14 "to an actual, particularized danger that [they] would not otherwise have faced." Dkt. 65 at p. 25
 15 (citing Dkt. 23 at p. 18).

16 The answers to these questions cannot be ascertained through generalized proof. Activities
 17 within the CHOP varied within the Class Area and also varied by the specific date and time
 18 between June 9 and July 1. The City's response to the CHOP and the unprecedented, dynamic,
 19 unfolding set of circumstances it presented thus also varied greatly both temporally and
 20 geographically. *See Farmer Decl.*, Ex. 64 (Best Dep. at 174:18-19). For instance, the protest zone
 21 was largely contained to Cal Anderson Park and the area immediately around the East Precinct.
 22 *See Appendices A-D*. The City's activities in attempting to de-escalate the protests while also
 23 protecting the protestors' First Amendment rights were also largely focused on these same areas.
 24 The City has already established that several of the businesses within the Class Area were closed
 25 and/or operating at limited capacity during the Class Period due to Covid-19 restrictions and that a
 26 significant number of residents were either out of town or supported the protest activity during the

1 Class Period. *See supra* Section II.A. Consequently, to what extent, if any, the City exposed any
 2 of the putative class members to the same, particularized danger cannot be answered on a class-
 3 wide basis.

4 *Discovery disputes:* Contrary to Plaintiffs' assertions, the issues related to the missing texts
 5 must also be resolved on an individual basis. As noted, several businesses remained closed and
 6 several residents were living elsewhere due to Covid-19 throughout June and July 2020. Issues
 7 related to the missing texts therefore are irrelevant to those putative class members; they were not
 8 injured by the City's actions, including any alleged deletion of text messages.

9 To the extent discovery issues are relevant to class certification at all, those issues
 10 demonstrate that Plaintiffs are in different positions and have different levels of alleged spoliation
 11 exposure as well. Several Plaintiffs have conceded that they deleted or lost text messages relating
 12 to CHOP after the litigation began and have made no efforts to recover them. Farmer Decl., Ex. 48
 13 (Thompson Dep. at 104:16-106:13); Ex. 19 (Donner Dep. at 197:20-24, 199:4-14); Ex. 28 (Biller
 14 Dep. at 74:7-15, 211:9-14). Additionally, Plaintiff Wade Biller testified that businesses in the Cal
 15 Anderson area, including some Plaintiffs here, set up a group message board on the encrypted
 16 messaging app, Signal, in order to discuss the CHOP. But instead of preserving the messages and
 17 producing them in the litigation, some Plaintiffs and businesses intentionally changed their settings
 18 so that the messages would be deleted and not produced in the litigation:

19 Q: Did anybody ever say anything about having set their setting to not retain the
 20 messages on Signal?

21 A: People did change their settings to shorter settings from time to time
 22 depending on their comfort level. I know LaRisa [of Northwest Liquor] was one
 23 later in the game, just recently. That was never the concern initially. It became
 more of a concern as more people became aware that the information was being
 shared with attorneys and people had concerns.

24 Farmer Decl., Ex. 28 (Biller Dep. at 74:7-15). These missing text messages deprive the City of
 25 statements made by the named Plaintiffs and putative class members that could illuminate other
 26 differences between the putative class members' situations, including statements that could be

1 relevant to opposing certification of the many issues and subclasses Plaintiffs are asking this Court
2 to certify.

3 **2. No typicality: The plaintiffs have not shown that proposed subclass members**
4 **suffered the same or similar injury as the proposed subclass representatives.**

5 “The purpose” of Rule 23(a)’s typicality requirement “is to assure that the interest of the
6 named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976
7 F.2d 497, 508 (9th Cir. 1992). “The test of typicality ‘is whether other members have the same or
8 similar injury, whether the action is based on conduct which is not unique to the named plaintiffs,
9 and whether other class members have been injured by the same course of conduct.’” *Id.* (citation
10 omitted).

11 Plaintiffs argue, without any elaboration, that they “easily satisfy this standard” because
12 each named Plaintiff “owned property in, did business in, or resided in the Class Area on the Class
13 Date.” Dkt. 65 at p. 29. This statement is wrong and woefully inadequate to establish that anyone
14 in Plaintiffs’ three proposed subclasses even suffered an injury, much less (1) an injury that was
15 the “same or similar” to the injury allegedly suffered by the proposed subclass representative or (2)
16 that any “same or similar” injury suffered was the result of the same course of conduct—a
17 prerequisite under Rule 23(a)’s typicality requirement. As the *Sprague v. General Motors Corp.*
18 court held, typicality is not present where a “named plaintiff who proved his own claim would not
19 necessarily have proved anybody else’s claim. The premise of the typicality requirement is simply
20 stated: as goes the claim of the named plaintiff, so go the claims of the class.” 133 F.3d 388, 399
21 (6th Cir. 1998) (citation omitted).

22 Here, for each of Plaintiffs’ claims, each Plaintiff and each putative class or subclass
23 member must prove (1) an action by the City that (2) caused that person or entity harm. Doing so
24 will require individualized proof to establish the *fact* of injury, and also the *cause* of the alleged
25 injury. Only some of the putative class and subclass members (assuming they were even present
26 during the CHOP) lived, worked, and/or owned property within the SPD and SFD Red Zones of
the Class Area, and the experiences of people inside and outside that zone were vastly different.

1 Plaintiffs' proposed Property Owners Subclass representative Hunters Capital is even claiming
 2 damages for properties many blocks *outside* the Class Area. Farmer Decl., Ex. 84 (Oaksmith Dep.
 3 at 144:8-146:1).

4 Typicality "is not satisfied" "[w]here some of the class members have not suffered any
 5 injury, though the class representative has." *Ferguson v. Randy's Trucking, Inc.*, No. 1:15-00697,
 6 2016 WL 4082900, at *10 n.7 (E.D. Cal. Mar. 11, 2016).¹⁹ Here, Rancho Bravo, which until
 7 February 7, 2022, was a named Plaintiff, actually saw an increase in revenue during the
 8 approximately three-week time period between June 9, 2020 and the date the City cleared Cal
 9 Anderson Park and the surrounding area. Farmer Decl., Ex. 39. So, too, did Plaintiff Richmark
 10 Label. Farmer Decl., Ex. 40. King County's Covid-19 protocols also affected different members
 11 of the putative Business Owners class differently. Some businesses within the Class Area, like
 12 Unicorn Bar but unlike the proposed Business Owners Subclass representatives, were required to
 13 remain closed by the Covid-19 rules for the duration of the Class Period. Many members of the
 14 putative Residents and Business Owners Subclasses actively supported the protests, with several
 15 members of the putative Business Owners Subclass posting messages in support of the protests on
 16 social media and some members of the putative Residents Subclass participating in the protests or
 17 otherwise voicing their support. *See supra* at p. 8 & n.5. Plaintiffs fail to satisfy Rule 23(a)(3)
 18 typicality.

19 **3. No adequacy: The plaintiffs cannot fairly and adequately protect absent class**
 20 **members.**

21 As Plaintiffs acknowledge (Dkt. 65 at p. 29), the "determin[ation] as to "whether the
 22 adequacy prong is satisfied" requires that "courts consider two questions: '(1) Do the
 23 representative plaintiffs and their counsel have any conflicts of interest with other class members,
 24 and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf

25
 26 ¹⁹ *See also* *Burton v. Nationstar Mortg., LLC*, No. 1:13-00307, 2014 WL 5035163, at *11 (E.D. Cal. Oct. 8, 2014) (same), *report and recommendation adopted*, 2014 WL 5528140 (E.D. Cal. Oct. 31, 2014); *O'Neill v. Gourmet Sys. of Minn., Inc.*, 219 F.R.D. 445, 453 (W.D. Wis. 2002) (no typicality where "it is likely that many of the members of plaintiff's proposed classes have suffered *no injury at all*").

of the class?” *Schumacher v. Inslee*, No. C18-5535 MJP, 2021 WL 1019823, at *2 (W.D. Wash. Mar. 17, 2021) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003)). An irreconcilable conflict preventing class certification exists when some members of the class support the defendant’s conduct and or/goals at issue. *See Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (finding impermissible intra-class conflict with class members “who did not oppose the” conduct at issue “and who, in fact, approved of it and wished the policies fully enforced”); *Schumacher*, 2021 WL 1019823, at *3 (“the Plaintiffs cannot represent those who approve of the Union and its activities”).

Here, the opinions of the putative subclass members were and are deeply divided about the propriety, legality, and wisdom of the City’s actions at issue in this lawsuit. Many disagree with Plaintiffs’ decision to sue. One putative Class member wrote to her landlord (Hunters Capital) on June 17, 2020:

Over the past couple weeks, it has become increasingly clear that Ryan and my personal political views and those of Hunters Capital and the Broadway Building are not aligned. We fully support Black Lives Matter, disagree with your statement that “civil disobedience is not the answer” in reference to the CHOP, and it is not hyperbole to say that I have felt safest in this neighborhood in the past week and a half that SPD has been removed from the East Precinct.

We would like to make a request that when Hunters Capital and the Broadway Building engage in talks with the city, SDOT, and SPD that you not speak on our behalf politically or lump our views in with those of our organizations. . . .

. . . [W]e feel it is necessary that we voice our support of the CHOP

Farmer Decl., Ex. 23. Others reacted similarly, approving the City’s decision to withdraw from confrontations with protesters. Farmer Decl., Ex. 24; Ex. 83.

The owner of Poquitos, a restaurant just one block from the East Precinct and well within the Class Area, opted not to join this lawsuit stating, “Other than being closed for the two days out of concern for the staff and losing a limited number of sales due to doing take out sales, which was our choice, it’s nothing worse than what we were dealing with with the protests and nightly dispersals.” Farmer Decl., Ex. 41. Instead, Poquitos pursued its own claim for \$123.32 for a

broken window against the City (Farmer Decl., Ex. 42), further confirming that a class action is not necessary for redress. Plaintiffs' adequacy arguments fail.

C. Plaintiffs Failed to Demonstrate Compliance with Rule 23(b).

1. No predominance: Any City liability requires individualized determinations.

Although Rule 23(b)(3)'s predominance inquiry does not apply in quite the same way in the context of an issue class, *see Stickles v. Atria Senior Living, Inc.*, No. C 20-09220 WHA, 2021 WL 6117702, at *7 (N.D. Cal. Dec. 27, 2021) ("[i]ssue certification requires that common questions predominate over individual questions with respect to only the specific issue[s] that [are] certified"), courts have warned against the "overly aggressive application of Rule 23(c)(4)" precisely because that overly aggressive application "would nullify Rule 23(b)(3)'s predominance requirement." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 464 (S.D.N.Y. 2018) (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996 ("[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended."))). "[A] class action movant cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will 'predominate')' when more substantial individual issues remain." *Id.* (quoting 1 *McLaughlin on Class Actions*, § 4:43 (14th ed.)); *see also Valentino*, 97 F.3d at 1234 (error not to consider predominance).

Here, Plaintiffs attempt to satisfy Rule 23(b)(3)'s predominance requirement by arguing that the issues they seek to certify will "[w]ithout exception" "turn on common evidence and legal argument": "None of the issues turn on evidence about what any Plaintiff or Class member did or did not do, or what specifically was done or said to any Plaintiff or Class member." Dkt. 65 at p. 30. This is untrue. And it is based on a misunderstanding of the law. Plaintiffs' position is that, because they have pointed to anecdotal and often isolated instances of vandalism, uncollected or accumulated trash, violent acts by third parties, etc. that occurred somewhere within the 16-block Class Area at some point during the three-week period between June 9 and July 1, 2020, they have

1 satisfied Rule 23(b)(3)’s predominance requirement as to the City’s liability with respect to each of
 2 the 30 issues they seek to have this Court certify. Not so.

3 To establish predominance, Plaintiffs must produce evidence that is capable of use at trial
 4 in individual—not just class action—cases. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442,
 5 456 (2016) (representative evidence is permissible to establish predominance if “each class
 6 member could have relied on that sample to establish liability if he or she had brought an
 7 individual action.”). This is the rule because plaintiffs and defendants cannot have “different rights
 8 in a class proceeding than they could have asserted in an individual action.” *Id.* at 458. If
 9 evidence could not be “relied on . . . to establish liability” in an “individual action,” *id.* at 455, then
 10 it cannot establish predominance at the class certification stage.

11 Here, Plaintiffs cannot satisfy the predominance requirement because the evidence
 12 Plaintiffs will put forward in an attempt to establish the City’s liability on a class-wide basis would
 13 not be sufficient to establish liability in the context of individual actions, regardless of the subclass
 14 in which the putative class member would fall. *See supra* Section III.B.1. No putative class
 15 member, for example, could rely of Madrona’s claim for [REDACTED] in lost rent from
 16 Unicorn Bar in order to prove that they too have a claim against the City based on the City’s
 17 actions regarding the CHOP; the evidence establishes that all of that lost rent was because Covid-
 18 19 protocols prevented Unicorn Bar from opening until mid-August 2020, and not because of the
 19 CHOP. Farmer Decl., Ex. 10. Nor could any putative class member cite to the alleged graffiti or
 20 other physical damage to named Plaintiff Hunters Capital’s Dunn Motors Building, Greenus
 21 Building, or Colman Building (*see* Farmer Decl., Ex. 84 (Oaksmith Dep. at 144:8-146:1)) to prove
 22 their claims against the City; those three buildings all are located more than three blocks away
 23 from the Class Area. *See* Appendix A; *see also, e.g., Duncan v. Nw. Airlines, Inc.*, 203 F.R.D.
 24 601, 602 (W.D. Wash. 2001) (“a negligence claim . . . requires an individualized examination of
 25 causation and proof of present injury”). Common issues do not predominate here, even as parsed
 26 by Plaintiffs.

2. No superiority: Putative class and subclass members have an incentive to pursue their claims against the City on an individualized basis.

“The superiority inquiry under Rule 23(b)(3) requires determining whether the objectives of the particular class action procedure will be achieved in the particular case,” and thus “necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998), *overruled on other grounds*, *Wal-Mart*, 564 U.S. 338; *see also Valentino*, 97 F.3d at 1234-35 (class action superior only “if no realistic alternative exists”). In making that determination, courts “assess[] . . . the non-exclusive factors listed in Rule 23(b)(3),” *Hanlon*, 150 F.3d at 1023, including (1) “the class members’ interests in individually controlling the prosecution or defense of separate actions,” Fed. R. Civ. P. 23(b)(3)(A); (2) “the extent and nature of any litigation concerning the controversy already begun by or against class members,” Fed. R. Civ. P. 23(b)(3)(B); and (3) “the likely difficulties managing a class action,” Fed. R. Civ. P. 23(b)(3)(D). Application of those factors here makes plain that class treatment of Plaintiffs’ claims is not “superior to other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). To the contrary, class certification is not necessary to allow putative class and subclass members to pursue their claims against the City on an individualized basis, whether administratively or through litigation.

First, “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted); *see also Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (first 23(b)(3) factor “weighs in favor of certifying a class action . . . [w]here damages suffered by each putative class member are not large”). Consequently, actions involving larger claims susceptible to individual proof weigh against certification. *See, e.g., Zinser*, 253 F.3d at 1190-91 (denying certification where minimum damages claim for each plaintiff/class member exceeded \$50,000).²⁰

²⁰ *Colman*, 325 F.R.D. at 651 (denying certification of class of “sophisticated” investors “with claims that range from \$15,000 to as much as \$17,350,200”); *Cole v. Gene by Gene, Ltd.*, 322 F.R.D. 500, 508 (D. Alaska 2017) (individual

The same is true for actions providing for the availability of attorney fees. *See, e.g., Morrison v. Esurance Ins. Co.*, C18-1316 TSZ, 2020 WL 583824, at *6 (W.D. Wash. Feb. 6, 2020); *Truesdell v. Thomas*, 889 F.3d 719, 723 (11th Cir. 2018) (superiority requirement not met where law at issue “encourages individual litigation by offering liquidated damages and attorney’s fees”).

Here, the “large dollar values” of Plaintiffs’ estimated damages claims and the availability of attorney fees pursuant to federal law (*see* Dkt. 47 at p. 68 (praying for attorney fees)) “shows that individual actions are a logically and economically viable alternative to class treatment.” *Colman v. Theranos, Inc.*, 325 F.R.D. at 629, 651 (N.D. Cal. 2018). Indeed, Plaintiffs’ preliminary damages estimates,²¹ summarized immediately below, confirm that all but four of the named Plaintiffs seek damages of over \$50,000, with Hunters Capital seeking more than \$3.7 million in damages:

Plaintiffs’ Estimated Damages (May 10, 2021)	
<u>Plaintiff</u>	<u>Damages Amount</u>
Argento	\$68,950
Bergman’s Lock and Key Services	\$19,800
Wade Biller	(unquantified)
Hunters Capital, LLC	\$3,787,423
Madrona Entities	\$209,816
Olive St. Apartments LLC	\$71,505
Onyx Homeowners Association	\$9,505
Matthew Ploszaj	\$50,000
Redside Partners	\$10,000
Richmark Company	\$217,135
Shuffle LLC (d/b/a Cure Cocktail)	\$397,443
SRJ (d/b/a Car Tender)	\$240,000
Sway and Cake	\$169,765
TOTAL	\$5,764,562

Farmer Decl., Ex. 14 (Cronauer Dep. at 89:7-18); Ex. 82; Exs. 85-90.

Second, the several other legal actions pending against the City seeking protest-related

claim for \$100,000 “weighs strongly against class certification”); *Stoudt v. E.F. Hutton & Co.*, 121 F.R.D. 36, 38 (S.D.N.Y. 1988) (superiority defeated where plaintiff “possesse[d] sufficient wealth to benefit from a tax shelter and [sought] recovery in the amount of ‘at least’ \$60,000”).

²¹ Some Plaintiffs revised their claimed damages during deposition discovery; their May 10, 2021 discovery responses remain a fair benchmark of their estimated damages for purposes of this motion practice.

1 damages also weigh against class certification. As the Ninth Circuit stated in *Zinser*, “the
 2 existence of [other] litigation indicates that some of the interested parties have decided that
 3 individual actions are an acceptable way to proceed, and even may consider them preferable to a
 4 class action,” which in turn indicates that “a class action may not be appropriate.” 253 F.3d at
 5 1191 (citation omitted). Not including Plaintiffs, over 85 claimants have filed notices of tort
 6 claims for various protest-related damages allegedly caused by the City in and around the Class
 7 Area. Farmer Decl., Ex. 42. And over 50 of those claims are being prosecuted as individual tort
 8 actions in state and federal court. *Id.* Plaintiffs also concede that “dozens” of putative class and
 9 subclass members “are interested in pursuing their own lawsuits against the City” and have
 10 indicated they would be willing to “file their own case” (Dkt. 66 at p. 3 ¶ 6; Dkt. 65 at p. 32), thus
 11 demonstrating that the issues Plaintiffs seek to have certified can be and are being litigated on
 12 individual bases.

13 Finally, the difficulties and inefficiencies in managing a class action which typically weigh
 14 against certification are not only “likely,” but instead certain to occur in this case. “[A] class
 15 action is not ‘superior’” under Rule 23(b)(3)(4) “[i]f each class member has to litigate numerous
 16 and substantive separate issues to establish his or her right to recover individually.” *Zinser*, 253
 17 F.3d at 1192.²² Here, and as discussed in more detail in the next section, even if all 30 of
 18 Plaintiffs’ proposed issue classes were certified, additional and significant issues necessary to
 19 establish the City’s liability would remain unresolved. Plaintiffs’ own proposed trial plan makes
 20 that plain. In addition to deferring the adjudication of class members’ “Causation Questions” to
 21 “subsequent proceedings,” Plaintiffs’ proposed trial plan also acknowledges that additional
 22 discovery on issues of the City’s liability to all unnamed class members also would need to be
 23 taken following trial of the certified claims: “Prior to this trial, the parties will have full discovery
 24 on all *common* issues” Dkt. 66-1 at p. 6 (emphasis added). Class treatment is not superior.

25
 26 ²² See also *Berry v. Transdev Servs., Inc.*, No. C15-01299-RAJ, 2019 WL 117997, at *7 (W.D. Wash. Jan. 7, 2019) (denying certification where “class action would be unmanageable given the predominance of the individual issues necessary to establish [defendants’] liability”); *Tasion*, 308 F.R.D. at 640 (superiority requirement not met where “certification . . . of an issue would resolve only one of many issues necessary to establish liability”).

D. Plaintiffs Have Failed to Comply with Rule 23(c).

Even if Plaintiffs had satisfied Rules 23(a) and (b)(3), they have failed to show that certification of any of the proposed issues or subclasses is “appropriate,” i.e., would “materially” or “significantly” “advance th[is] litigation,” as Rules 23(c)(4) and (c)(5) require. *Valentino*, 97 F.3d at 1229; *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015). Certification of Plaintiffs’ proposed issues classes and subclasses will not “achieve[] judicial economy and efficiency.” *Valentino*, 97 F.3d at 1229. The opposite in fact: certifying Plaintiffs’ multiple subclasses and issue classes will leave unresolved many issues necessary to establish the City’s liability to any putative class member, in addition to any damages owed.

The “typical” Rule 23(c)(4) case is one in which certification resolves all of the issues “necessary to establish . . . liability,” “leaving only damages to be litigated on an individual bases.” *Tasion*, 308 F.R.D. at 640 (citing *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 214, 226 (2d Cir. 2006) (Rule 23(c)(4) may be used “to separate the issue of liability from damages”)); *accord* Fed. R. Civ. P. 23 advisory committee’s note to 1966 amendment (“the action may retain its ‘class’ character only through the adjudication of *liability to the class*; the members of the class may thereafter be required to come in individually and prove *the amounts* of their respective claims” (i.e., not whether they have a claim) (emphasis added)). This is also true of the cases Plaintiffs cite on page 32 of their opening brief.²³

This case, however, is not the typical Rule 23(c)(4) or (5) case. Even if Court certified each of the proposed issues and subclasses, and the Court and jury were to resolve in Plaintiffs’ favor each of the 30 issues they identify at the first proposed trial, the question of the City’s liability to the putative class and subclass members could not be answered on a class basis with respect to each of the five claims Plaintiffs have brought against the City. These unresolved issues

²³ See Dkt. 65 at p. 32 (citing *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (reversing denial of certification, where district court “based its manageability concerns on the need to individually calculate damages”); *In re Whirlpool*, 722 F.3d 838, 861 (6th Cir. 2013) (certifying class where “resol[ution]” of “the common liability questions” would allow the court to “either enter judgment for [the defendant] or proceed to the question of plaintiffs’ damages”); *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (certifying two subclasses, where “[t]here [wa]s a single, central, common issue of liability: whether the Sears washing machine was defective”)).

of liability would include, without limitation (1) for Plaintiffs’ procedural and substantive due process claims, whether the individual class/subclass member (as opposed to some other putative class/subclass member) was deprived of a constitutional right because of the City’s actions or statements; (2) for Plaintiffs’ takings claim, whether the City’s actions deprived the individual class/subclass member all or nearly all of their use or access to their property and whether the individual class/subclass member has standing to pursue a takings claim under the terms of their respective lease; (3) for Plaintiffs’ negligence claim, the key issues of causation and harm; and (4) for Plaintiffs’ nuisance claim, whether the individual class/subclass member experienced the particular nuisance caused by the City’s conduct. In addition, each putative class/subclass member claiming economic harm damages would also have to prove that the City’s actions were both the cause-in-fact and proximate cause of that economic harm, as opposed to, for example, the result of Covid-19 concerns and protocols.

Courts have declined to certify issues classes and subclasses in cases presenting circumstances similar to those outlined above. In *McLaughlin v. American Tobacco Co.*, for example, the Second Circuit declined to “employ Rule 23(c)(4) to certify a class as to common issues that do exist,” reasoning:

Nevertheless, in this case, given the number of questions that would remain for individual adjudication, issue certification would not ‘reduce the range of issues in dispute and promote judicial economy.’ Certifying, for example, the issue of defendants’ scheme to defraud, would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages.

522 F.3d 215, 234 (2d Cir. 2008) (citation omitted), *abrogated on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also Tasion*, 308 F.R.D. at 640 (declining to certify a Rule 23(c)(4) class where, as here, “certification . . . would resolve only one of many issues necessary to establish only liability”). In light of the number of issues that would remain unresolved in this case, certification of Plaintiffs’ proposed issues and subclasses is inconsistent with the requirements of Rules 23(c)(4) and (5).

E. Plaintiffs Have Failed to Establish that Putative Class Members Have Standing.

Finally, even if Plaintiffs otherwise satisfy Rule 23’s requirements, certification of the proposed issues and subclasses is inappropriate: some members of Plaintiffs’ putative class and subclasses lack the requisite Article III standing. *See Amchem*, 521 U.S. at 612-13 (while “appropriate to reach [class certification issues] first” because they are “logically antecedent to the existence of any Article III issues,” courts also must be “mindful” of “Article III constraints, and with the Rules Enabling Act,” 28 U.S.C. § 2072(b)); *accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

Plaintiffs, as the party invoking federal jurisdiction, “bear the burden of demonstrating standing,” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021), i.e., that they (1) “suffered an injury in fact,” (2) “the injury is fairly traceable to the challenged conduct,” and (3) the injury “is likely to be redressed by a favorable judicial decision,” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012) (citations omitted); *see also Spokeo, Inc. v. Robbins*, 578 U.S. 330, 340 (2016) (“an injury in fact must be both concrete *and* particularized”). In the context of a class action, the Supreme Court in *TransUnion* established that “[e]very class member must have Article III standing in order to recover individual damages.” 141 S. Ct. at 2208 (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring))); *see also* 28 U.S.C. § 2072(b) (no court rule, including Rule 23, “shall . . . abridge, enlarge or modify any substantive right”). While the Supreme Court has not “address[ed] the distinct question whether every class member must demonstrate standing *before* a court certifies a class,” *TransUnion*, 141 S. Ct. at 2208 n.4 (emphasis added), the Ninth Circuit has: “[N]o class may be certified that contains members lacking Article III standing,” *Mazza*, 666 F.3d at 594 (citation omitted); *see also Bunch v. Nationwide Mut. Ins. Co.*, No. C12-1238JLR, 2013 WL 6632025, at *5 (W.D. Wash. Dec. 17, 2013) (“Under controlling Ninth Circuit law, the court may not certify a proposed class containing

members who cannot establish an Article III case or controversy.”).^{24, 25}

Plaintiffs’ proposed subclasses include all individuals and businesses who on a single day, June 9, 2020, were either property owners, held business licenses, or were residents in the Class Area. Dkt. 65 at p. 20. This group includes the absent property owners who leased their property to tenants who continued to pay their rent during the Class Period (the vast majority); the businesses that were closed, not because of CHOP, but because of Covid-19-related restrictions or concerns; the residents who were out of town during CHOP; the property owners who closed on the sale of their property after June 9 based on a purchase and sale agreement entered into before that date; the numerous proposed class members who did not experience restricted access or other adverse impacts due to the CHOP; the “licensed” business owners whose licensed businesses were outside the CHOP (the address associated with a Seattle business license is often not the location of the actual business); and those proposed class members who actually participated in or assisted the CHOP protests about which Plaintiffs complain. None of these listed individuals or businesses would have Article III standing, as they did not experience any “injury-in-fact”:

We have consistently distinguished injury from damages. *See, e.g., Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 188 (3d Cir. 2001) (“Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury).”) This is significant, as we apply a more lenient predominance standard for damages than for injury. While every plaintiff must be able to show . . . injury through evidence that is common to the class, . . . damages need not be “susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”

In re: Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184, 194 (3d Cir. 2020) (citations omitted).

²⁴ But see *K.M. v. Regence Blueshield*, No. C13-1214RAJ, 2014 WL 801163, at *3 (W.D. Wash. Feb. 27, 2014) (but relying on dicta).

²⁵ The City also notes that the Ninth Circuit’s pending en banc opinion in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021), *reh’g en banc granted*, 5 F.4th 950, may provide additional, definitive guidance regarding the extent to which, if at all, a proposed class that contains uninjured parties, may be certified. Those standing arguments were briefed and argued to the en banc panel.

1 If class members themselves do not believe they suffered an “injury in fact,” let alone one
2 “fairly traceable” to the City’s decisions on how to manage the situation in the Class Area in June
3 and early July 2020, then those putative class members lack Article III standing and a case cannot
4 be prosecuted on their behalf. Here, the evidence confirms that some of the proposed class
5 members either participated in the CHOP or assisted those who participated. These class members
6 include residents of the 12th Ave Arts, residents of the Packard building, certain tenants of Hunters
7 Capital, the Sunset Electric Apartments, and several business owners within the Class Area. *See*
8 *supra* p. 5 & n.8. These are hardly the responses of individuals or businesses believing themselves
9 harmed by the City’s decision to allow CHOP protesters to exercise their First Amendment rights
10 while managing the City’s response in a way intended to maintain safety and avoid violence in the
11 area.

12 Plaintiffs cannot be permitted to pursue claims on behalf of imputed class members who
13 could not bring an action themselves because they suffered no “injury in fact.”

14 IV. CONCLUSION

15 Plaintiffs have “stretch[ed]” Rule 23 “beyond its intended application.” *Tasion*, 308 F.R.D.
16 at 639. Consequently, and for the foregoing reasons, the City requests that the Court decline to
17 certify any of Plaintiffs’ proposed issues or subclasses and dismiss the class allegations.
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DATED this 7th day of February, 2022.

Ann Davison
Seattle City Attorney

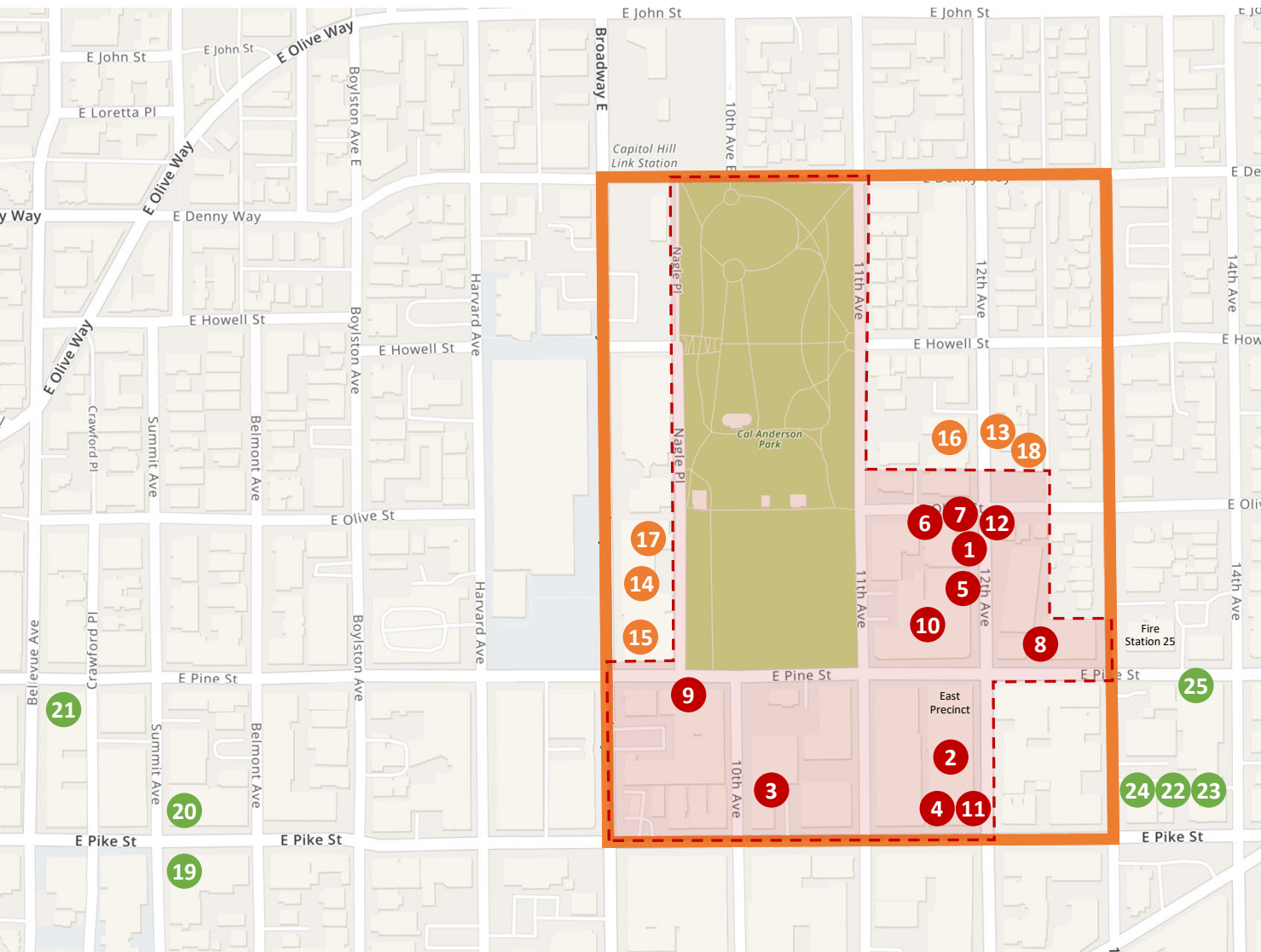
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Attorneys for the City of Seattle

APPENDIX A



Class Area - - - SPD Red Zone

SPD Red Zone and Named Plaintiffs' Locations

Locations Inside the Red Zone

- 1 Argento LLC
- 2 HC: The Ballou Wright Building
- 3 HC: The Pike Building
- 4 12th & Pike Associates LLC
- 5 Northwest Liquor and Wine LLC
- 6 Olive Street Apartments LLC
- 7 Onyx Homeowners Association
- 8 Matthew Ploszaj
- 9 Redside: Oddfellows Building
- 10 Richmark Company DBA Richmark Label
- 11 Sway and Cake LLC
- 12 Wade Biller

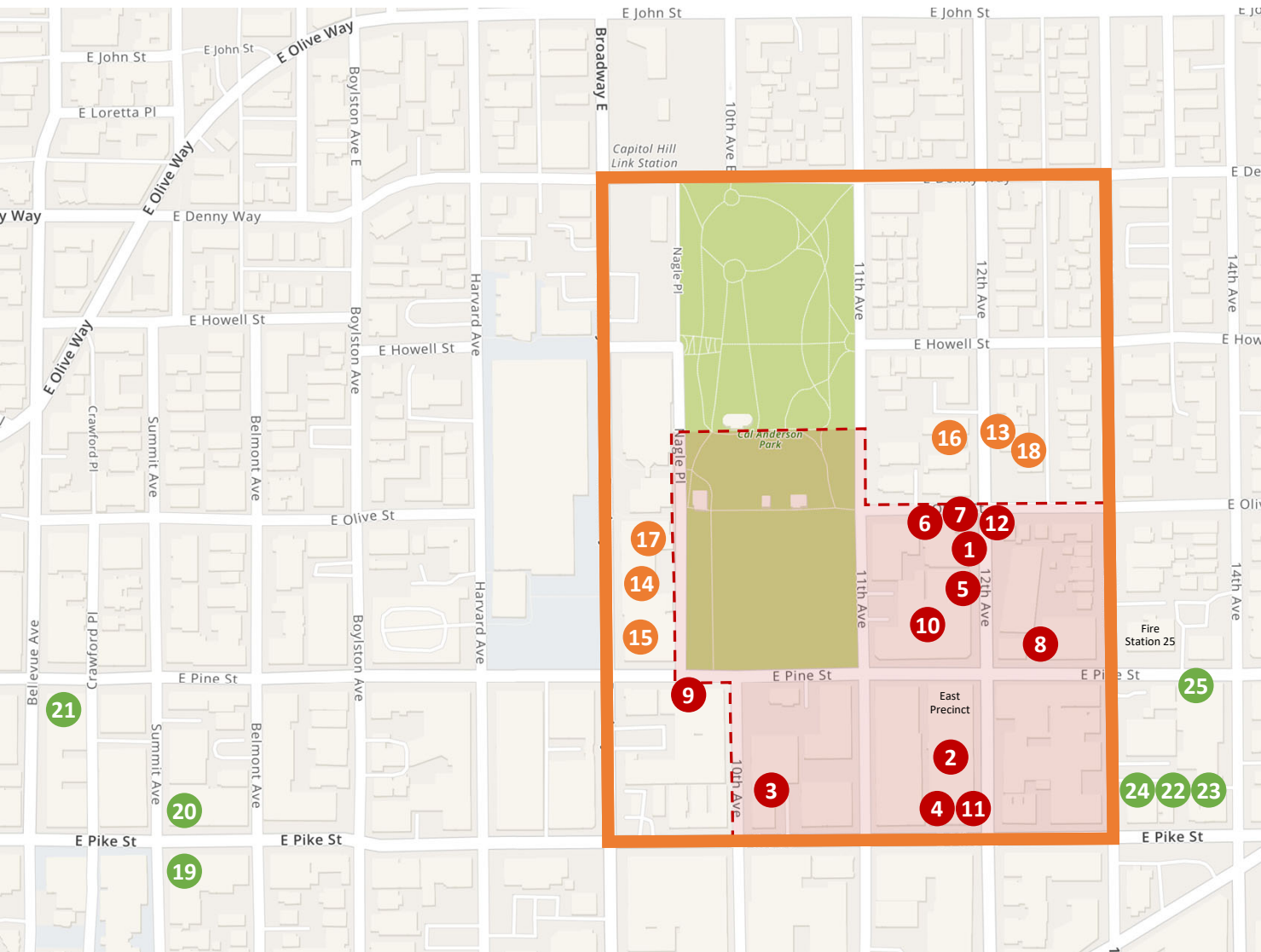
Locations Within Class Area but Outside Red Zone

- 13 Bergman's Lock and Key Services LLC
- 14 HC: The Broadway Building
- 15 HC: The 900 Pine Building
- 16 Redside: 1715 12th Ave
- 17 Shuffle LLC DBA Cure Cocktail
- 18 SRJ Enterprises DBA Car Tender

Locations Outside the Class Area

- 19 HC: The Dunn Motors Building
- 20 HC: The Greenus Building
- 21 HC: The Colman Building
- 22 Madrona Real Estate Investors VI LLC
- 23 Madrona Real Estate Investors IV LLC
- 24 Madrona Real Estate Services LLC
- 25 Redside: 1323 E. Pine Street

APPENDIX B



Class Area SPD Red Zone

SFD Red Zone (June 12–29, 2020) and Named Plaintiffs' Locations

Locations Inside the Red Zone

- 1 Argento LLC
- 2 HC: The Ballou Wright Building
- 3 HC: The Pike Building
- 4 12th & Pike Associates LLC
- 5 Northwest Liquor and Wine LLC
- 6 Olive Street Apartments LLC
- 7 Onyx Homeowners Association
- 8 Matthew Ploszaj
- 9 Redside: Oddfellows Building
- 10 Richmark Company DBA Richmark Label
- 11 Sway and Cake LLC
- 12 Wade Biller

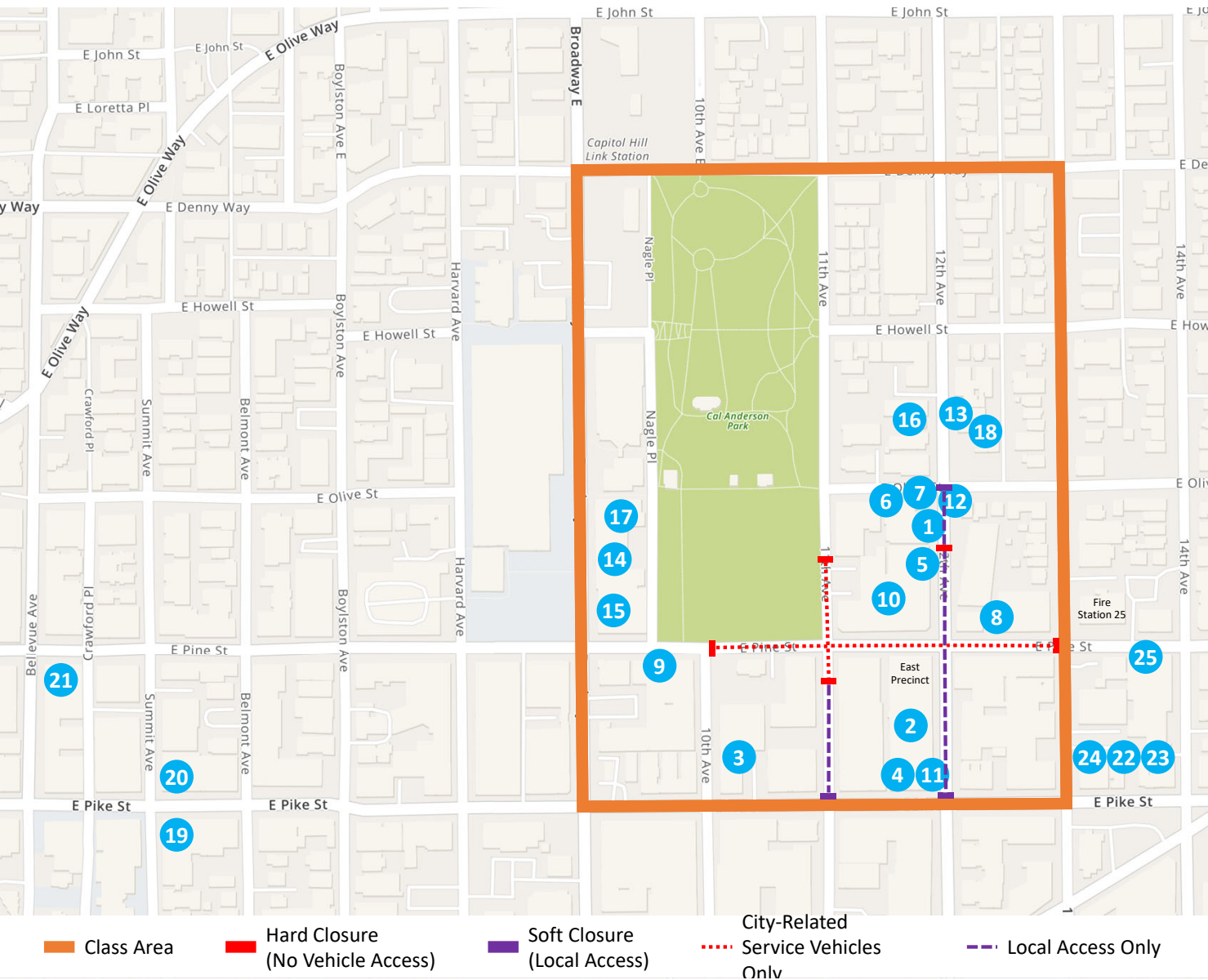
Locations Within Class Area but Outside Red Zone

- 13 Bergman's Lock and Key Services LLC
- 14 HC: The Broadway Building
- 15 HC: The 900 Pine Building
- 16 Redside: 1715 12th Ave
- 17 Shuffle LLC DBA Cure Cocktail
- 18 SRJ Enterprises DBA Car Tender

Locations Outside the Class Area

- 19 HC: The Dunn Motors Building
- 20 HC: The Greenus Building
- 21 HC: The Colman Building
- 22 Madrona Real Estate Investors VI LLC
- 23 Madrona Real Estate Investors IV LLC
- 24 Madrona Real Estate Services LLC
- 25 Redside: 1323 E. Pine Street

APPENDIX C



Barriers (June 10, 2020)

- 1 Argento LLC
- 2 HC: The Ballou Wright Building
- 3 HC: The Pike Building
- 4 12th & Pike Associates LLC
- 5 Northwest Liquor and Wine LLC
- 6 Olive Street Apartments LLC
- 7 Onyx Homeowners Association
- 8 Matthew Ploszaj
- 9 Redside: Oddfellows Building
- 10 Richmark Company DBA Richmark Label
- 11 Sway and Cake LLC
- 12 Wade Biller
- 13 Bergman's Lock and Key Services LLC
- 14 HC: The Broadway Building
- 15 HC: The 900 Pine Building
- 16 Redside: 1715 12th Ave
- 17 Shuffle LLC DBA Cure Cocktail
- 18 SRJ Enterprises DBA Car Tender
- 19 HC: The Dunn Motors Building
- 20 HC: The Greenus Building
- 21 HC: The Colman Building
- 22 Madrona Real Estate Investors VI LLC
- 23 Madrona Real Estate Investors IV LLC
- 24 Madrona Real Estate Services LLC
- 25 Redside: 1323 E. Pine Street

APPENDIX D

Option 3: Closing Pine from 10th to 11th, Half Street Closure from 11th to Alley

